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No. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

PAUL DUFFY and EUNICE DUFFY,

Appellants,

vs.

CITY OF ARCADIA,

Appellee.

On Appeal From the California Court of Appeal
Second Appellate District

JURISDICTIONAL STATEMENT

Robert Mann, *Counsel of Record*
Donald W. Cook
Attorneys at Law
1416 Second Street
Santa Monica, CA 90401

(213) 395-1294

Attorneys for Appellants
Paul Duffy and Eunice Duffy

QUESTIONS PRESENTED FOR REVIEW

1. Does the First Amendment require public entities to permit the distribution of newspapers by newsracks located on public property, under fair and reasonable time, place and manner restrictions?

2. May a public entity restrict the use of newsracks on public property by requiring newsracks to conform to arbitrary design restrictions which severely limit newsracks designed to distribute low circulation newspapers?

3. If a public entity elects to permit the use of newsracks on public property, may it require newsracks to conform to arbitrary design restrictions which severely limit newsracks designed to distribute low circulation newspapers?

4. If a public entity elects to permit the use of newsracks on public property, may it require all such newsracks to be of uniform appearance, even where such requirement will severely limit the distribution of low circulation newspapers?

5. If a public entity elects to permit the use of newsracks on public property, may it require all such newsracks to be under 48 inches in height, where there

is no evidence supporting the need for such height restriction, and the height restriction will severely limit the distribution of low circulation newspapers?

6. Where governmental regulations, such as newsrack design ordinances, restrict the exercise of First Amendment activities, such as the distribution of certain types of newspapers, and the governmental regulation is challenged, who has the burden of proving the reasonableness or unreasonableness of such governmental regulation? Does the governmental entity have the burden of showing the reasonableness of the regulation or does the party challenging the regulation have the burden of showing that it is unreasonable?

7. Where a party introduces uncontradicted evidence at trial showing that an ordinance restricting the design of newsracks will severely limit the distribution of certain types of newspapers, and such evidence is received by the trial court without objection, may a reviewing court refuse to consider such evidence as not worthy of belief?

TABLE OF CONTENTS

Questions Presented i-ii

Opinion Below 1

Jurisdiction 2

Constitutional Provisions and City Ordinance 3

Statement of the Case 4

Statement of Facts 5

Questions Presented Are Substantial 10

Conclusion 15

Appendix:

Appendix A. City of Arcadia Ordinance No. 1615 Amending Section 6439 of the Arcadia Municipal Code A-1

Appendix B. Judgment After Trial By Court, Los Angeles Superior Court (February 26, 1986) A-12

Appendix C. Opinion of the California Court of Appeal, Second Appellate District, Division Two, in Case No. B019050 (March 31, 1987) A-15

Appendix D. Order of the California Court of Appeal, Second Appellate District, Division Two, Denying Petition for Rehearing (April 23, 1987) A-24

Appendix E. Order of the California Supreme Court Denying Petition for Review (July 1, 1987)
A-25

Appendix F. Notice of Appeal to the Supreme Court of the United States (July 29, 1987)
A-26

Appendix G. Order of the California Supreme Court directing publication of Court of Appeal decision (September 17, 1987)
A-27

Appendix H. Order of Justice O'Connor Extending Time in which to Docket Appeal (October 14, 1987)
A-27

TABLE OF AUTHORITIES

Cases

American Railway Express Co. v. Levee,
263 U.S. 19 (1926) 3

City of Lakewood v. Plain Dealer Publishing Co.,
No. 86-1042 10, 11

Dills v. City of Marietta, Ga.,
674 F.2d 1377 (11th Cir. 1982), *cert. denied*, 461 U.S. 905 (1983) 14

Erznoznik v. City of Jacksonville,
422 U.S. 205 (1975) 3

Gannett Satellite Info. Network v. Town of Norwood,
579 F. Supp. 108 (D. Mass. 1984) 11

Hague v. CIO,
307 U.S. 496 (1939) 11

Jacobsen v. United States Postal Service,
812 F.2d 1151 (9th Cir. 1987) 14

Lovell v. Griffin,
303 U.S. 444 (1938) 11

Martinez v. California,
444 U.S. 277 (1980) 15

Miami Herald Pub. Co. v. City of Hallandale,
734 F.2d 666 (11th Cir. 1984) 11

Miami Herald Pub. Co. v. Tornillo,
418 U.S. 241 (1974) 12

Schad v. Borough of Mount Ephraim,
452 U.S. 61 (1981) 13

Schneider v. State,
308 U.S. 147 (1939) 13

Southern N.J. Newspapers v. New Jersey,
542 F. Supp. 173 (D. N.J. 1982) 11

Southeastern Promotions, Ltd. v. Conrad,
420 U.S. 546 (1975) 10

Williams v. Brufly,
96 U.S. 176, 183 (1878) 3

Constitution, Statutes and Ordinances

United States Constitution

First Amendment 3
Fourteenth Amendment 3, 14

United States Code

28 U.S.C. Section 1257 3
28 U.S.C. Section 2101 2
42 U.S.C. Section 1983 4, 15

Arcadia Municipal Code
Section 6439 3, 4, 6

No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

PAUL DUFFY and EUNICE DUFFY,

Appellants,

vs.

CITY OF ARCADIA,

Appellee.

JURISDICTIONAL STATEMENT

Appellants, Paul Duffy and Eunice Duffy, appeal from the final judgment of the California Court of Appeal, Second Appellate District, Division Two, dated March 31, 1987, which held that City of Arcadia Ordinance No. 1615 was constitutional under the First Amendment to the Constitution of the United States.

OPINION BELOW

The California Supreme Court has ordered that the opinion of the California Court of Appeal, which appears in the appendix hereto, p. A-15, *infra*, be published in the Official Reporter. (Appendix, p. A-27.) A citation to the Official Reporter is not yet available.

The judgment of the Los Angeles Superior Court,

JURISDICTION

Upon review of the trial court's judgment which held that Arcadia Ordinance No. 1615 did not violate the First Amendment to the United States Constitution in preventing appellants' from using Lowboy newsracks,[1] the California Court of Appeal, Second Appellate District, affirmed the trial court's judgment. The Court of Appeal's judgment was entered on March 31, 1987 (Appendix, p. A-15). Appellants, Paul and Eunice Duffy, filed a "Petition for Rehearing" which was denied on April 23, 1987. Thereafter, appellants sought review in the California Supreme Court. That Court denied appellants' "Petition for Review" on July 1, 1987. (Appendix, p. A-25.)

A Notice of Appeal to this Court was timely filed in the California Court of Appeal, Second Appellate District, on July 29, 1987. (Appendix, p. A-26.) This Court, per Order of Associate Justice Sandra Day O'Connor, extended the time in which to docket the appeal to October 29, 1987. (Appendix, p. A-28.)

This Appeal is being docketed timely within the period prescribed by statute and by the Rules of this Court. 28 U.S.C. Section 2101(c); *American Railway*

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[1] The term "newsracks" is synonymous with the term "newsboxes."

Express Co. v. Levee, 263 U.S. 19, 20-21. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(2). *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 207 n.3 (1975); *Williams v. Brufly*, 96 U.S. 176, 183 (1878).

CONSTITUTIONAL PROVISIONS AND CITY ORDINANCE

First Amendment, United States Constitution:

Congress shall make no law • • • abridging the freedom of the press; • • •

Fourteenth Amendment, United States Constitution:

No State shall • • • deprive any person of life, liberty, or property, without due process of law; • • •

Arcadia Municipal Code Section 6439 (Ordinance No. 1615):

Unattended Newspaper Racks. The vending of newspapers from unattended coin-operated vending machine, hereafter referred to as a news rack, placed on a public sidewalk, shall be permitted in accordance with the regulations in this section:

• • •

(9) No news rack shall exceed four (4) feet in height, thirty (30) inches in width or two (2) feet in thickness.

• • •

(18) News racks shall have wood grain panels and the mount shall be painted gloss black.
(Appendix, pp. A-1, A-4, A-6.)

STATEMENT OF THE CASE

Appellants distribute low circulation newspapers by means of newsracks in Arcadia, California. In December, 1984, the City of Arcadia (hereinafter sometimes referred to as "Appellee") advised appellants that their newsracks violated Arcadia Ordinance No. 1615 (codified at Arcadia Municipal Code Section 6439) and instructed appellants to remove their newsracks to avoid seizure and removal of the newsracks by the City. On January 2, 1985, appellants filed the within action in the Superior Court for Los Angeles County. Appellants sought, *inter alia*, declaratory and injunctive relief under 42 U.S.C. Section 1983.

On January 2, 1985, the court issued its temporary restraining order restraining appellee from enforcing Ordinance No. 1615, and on February 27, 1985, the court issued its preliminary injunction restraining enforcement pending trial. Following a trial on January 29, 1986, the court declined to enjoin subsection 6439(9), the specific subsection which made appellants' newsracks illegal. Thereupon, the court dissolved the preliminary injunction. (Appendix, p. A-12.)

Appellants appealed the court's decision to the California Court of Appeal, Second Appellate District. Appellants also sought immediate relief from the Court of Appeal to restrain enforcement of the ordinance pending the appeal. The court summarily denied the requested interim relief. Appellants then sought and successfully obtained relief from the California Supreme Court restraining appellee from enforcing Section 6439(9) pending the appeal to the Court of Appeal.

On the appeal, the Court of Appeal affirmed the trial court's judgment, holding that Ordinance No. 1615 was facially valid. The court also held that the City was not required to articulate the specific purposes for the ordinance when it was enacted. On appellants' contention that the ordinance unconstitutionally required them to use an impractical and unworkable newsrack model, the court rejected appellants' evidence. The court stated that appellants' failed to carry their burden of establishing that the ordinance was an unreasonable restriction on free speech activities. (Appendix, p. A-19 - A-20, p. A-22.)

STATEMENT OF FACTS

Appellants are independent newspaper distributors. Appellants distribute numerous different publications which are published weekly or biweekly. Appellants

claim Arcadia's newsrack ordinance severely and unreasonably limits the distribution of low circulation newspapers. For such papers the only practical means of reaching their readers is newsracks.

As compared to the larger, daily publications, appellants' papers have different circulation needs. Their papers are sold almost entirely through newsracks. Virtually the entire circulation of the type of papers distributed by appellants depends upon independent distributors like appellants who rely almost exclusively upon newsracks. In short, the survival of the papers distributed by appellants depends upon newsracks.

Appellants use a newsrack model known as a "Lowboy."[2] Its distinctive feature is its ability to distribute two different publications from a single newsrack. This ability permits a Lowboy to distribute publications sometimes precluded (because of space restriction)[3] from distribution at a particular location. The Lowboy also greatly reduces distribution cost, thus

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[2] Two different manufacturers build Lowboys but Lowboys are identical regardless of manufacturer.

[3] Arcadia Municipal Code Section 6439(6) & (8) limits the location at which newsracks may be placed and the number of newsracks permissible at each such location.

0making it possible to distribute many papers otherwise unable to reach the public.

On its face, Appellee's Ordinance No. 1615 bars Lowboy newsracks because the racks are too high.[4] Lowboys are either approximately 53 or 61 inches high,[5] whereas the ordinance requires that all newsracks be no higher than 48 inches. (Section 6439(9), see Appendix, p. A-4.)

The only newsrack which satisfies all of the ordinance's design restrictions (height, width, depth, color, etc.) is a "Model 100." The Model 100 is not a viable alternative to the Lowboy. It is expensive, distributes only a single publication, is not designed for low-volume publications like appellants', and, because it requires more sidewalk space than a Lowboy to do the

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[4] In early August, 1987, after appellants filed their Notice of Appeal to this Court, appellee informed appellants that the City would allow 53 inch high Lowboy newsracks (Lowboy mounted on a 8 inch half-height mount). Appellee, however, still refuses to permit a 60 inch Lowboy (Lowboy mounted on a 16 inch full height mount).

[5] The difference depends upon whether the Lowboy is installed on a half-height (8 inch) or full height (16 inch) pedestal mount.

same amount of work, is not suitable for distributing all of appellants' papers. The cost of converting to Model 100s is prohibitively expensive for appellants. Hence, if appellants could not use Lowboys and had to use Model 100s, appellants could not distribute many of their papers.

Appellee did not directly attack any of appellants' evidence. Appellee made no objection to any evidence, and appellee did not offer evidence that a newsrack other than a Model 100 was available which qualified under the ordinance. Appellee did not contest appellants' showing that their papers' circulation could not absorb the expense of Model 100 newsracks. Appellee did not offer any evidence to rebut appellants' showing that the City permitted many fixed objects on its sidewalks (*e.g.*, traffic control boxes) which were higher and larger than appellants' newsracks.

Appellee claims that the Ordinance's 48 inch height restriction was enacted to prevent obstructions to vision, prevent visual clutter and promote uniformity of newsrack appearance.

Appellee presented no evidence justifying the selection of 48" as the maximum reasonable height for newsracks. Nor did Appellee present any evidence that Appellants' newracks were aesthetically less pleasing

than any other newsrack.

Appellants presented uncontradicted evidence at trial that the "only way" the smaller weekly or biweekly newspapers they distributed could reach the public were through "independent small companies" like Appellants and that "newracks are almost the exclusive means by which they circulate." "If the government disrupts this balance by restricting the smaller papers access to newsrack distribution or artificially imposing extra costs upon that distribution process, the process simply stops and the diverse variety of small newspapers disappears." Appellant also broke down his distribution costs and showed that he could not continue to distribute low volume newspapers if he had to use the type newsrack required by the Ordinance. Mr. Duffy declared that "I personally know of at least two former distributors of small newspapers who did quit distributing in Arcadia when this ordinance came in because they could not afford to comply with the new model requirements or to challenge them in suits: the Martynecs and the former Free Press distributor."

Even though there had been no objection to such evidence at trial and no contrary evidence, the Court of Appeal found Appellants' "purported evidentiary showing inadequate" because "grounded upon inadmissible hearsay." Relying on California Evidence Code section

412, the court declared that Appellants should have submitted declarations from the distributors who had been forced out of Arcadia because of the Ordinance and that Appellants' uncontradicted testimony regarding their own business was "vague, speculative, and conclusionary." (Appendix, pp. A-21--A-22.)

After thus rejecting the uncontradicted evidence which had been introduced without objection by Appellants at trial, the Court of Appeal concluded that Appellants had not carried their burden of "establishing that the ordinance as applied results in an unreasonable restriction upon the exercise of constitutional guarantees." (A-22.)

QUESTIONS PRESENTED ARE SUBSTANTIAL

"Each medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems." (*Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975)). It appears that the time for the law of newsrack has arrived. Recently, this Court agreed for the first time to consider a case concerning the scope of constitutional protection afforded newspaper vending machines in the public forum. (*City of Lakewood v. Plain Dealer Publishing Co.*, No. 86-1042).

In *Lakewood*, appellant challenges a rule almost

universally accepted by lower courts: newsracks are a constitutionally protected means of distribution under such cases as *Hague v. CIO* 307 U.S. 496 (1939) and *Lovell v. Griffin*, 303 U.S. 444 (1938).[6] Appellant in the *Lakewood* case argues that the value of newsracks as a disseminator of ideas is minimal, whereas the potential harm is great. (Appellant's Brief on the Merits, pp. 27-28, *City of Lakewood v. Plain Dealer Publishing Co.*, No. 86-1042.)

Appellants herein submit that an pronouncement on the application of decisions like *Hague* and *Lovell* to newsracks should have the benefit of the facts in this case. Here, appellants' papers depend upon newsracks for their survival.[7] Appellants' papers need the most efficient and practical method available if the papers are to reach their readers. Through experience appellants learned that newsracks are that method, and in particular the double dispensing Lowboy newsrack

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[6] Examples of such lower court decisions are *Miami Herald Pub. Co. v. City of Hallandale*, 734 F.2d 666 (11th Cir. 1984), *Gannett Satellite Info. Network v. Town of Norwood*, 579 F. Supp. 108, 114 (D. Mass. 1984), and *Southern N.J. Newspapers v. New Jersey*, 542 F. Supp. 173 (D. N.J. 1982).

[7] In *Lakewood*, newsracks do not constitute a substantial part of the newspaper's circulation.

that they use.

A rule restricting or limiting the protection usually afforded newsracks probably will not imperil the existence of the *New York Times*. It could, however, sound the death knell for appellants' papers.

This case provides the Court with a valuable opportunity to weigh the claim of harm cause by newsracks. Appellants' Lowboy newsracks have been in Arcadia for years, and there has been no reports of a safety or traffic hazard or injury caused by the newsracks. Surely it is preferably for the Court to consider newsracks' asserted danger in a case where evidence was offered on this issue and considered by the courts.

Moreover, what should the protection be for newsracks where the City has opened its forum to newsracks? Few would disagree with the proposition that a governmental entity could not pass a law permitting only a certain type of newsrack on the basis that the government favors the papers distributed by that newsrack. To do so, would not result in an "uninhibited, robust" debate in the marketplace of ideas. (*Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 252-53 (1974).)

But what if certain papers use only a particular newsrack model, and the governmental entity bans such

newsrack model while permitting another newsrack model generally used by established, less controversial publications. If the goal is to protect the marketplace of ideas, then surely there must be judicial scrutiny that does, in fact, provide realistic protection instead of simply indulging in presumptions designed to uphold the ordinance. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 69-70 (1981); *Schneider v. State*, 308 U.S. 147, 161 (1939).

It is highly unlikely that a municipality would choose to suppress a newspaper by the direct method of simply banning the newspaper. However, where as in this case particular newspapers rely on a particular method of distribution--Lowboy newsracks--and effectively ban (or at least severely hamper) the newspapers by banning their means of distribution, there should be protection designed to prevent the city from accomplishing through the back door what was not possible through the front.

Arcadia's ordinance may be content-neutral on its face, but the effect nevertheless is to drive out of Arcadia those smaller, less established newspapers that depend heavily upon Lowboy newsracks. Appellants submit that when the effect of an ordinance is to severely handicap the distribution of certain newspapers, the city must do more to justify its ordinance than create *post-hoc* reasons for its enactment. *Schad*,

supra; *see also Dills v. City of Marietta, Ga.*, 674 F.2d 1377, 1381 (11th Cir. 1982), *cert. denied*, 461 U.S. 905 (1983)

In this case the Court of Appeal accepted Arcadia's claims and rejected appellants' evidence on the severe hardships faced by their papers if Lowboys were excluded. The Court of Appeal's decision has set a dangerous precedent for a method of distribution which has just come into its own.

The court of appeal violated appellants' due process rights. Appellee chose not to rebut or object to appellants' evidence. Yet, the court of appeal rejected the evidence. (Appendix, pp. A-22.)

Additionally, the Court of Appeal's decision creates a conflict between a decision of the Federal Ninth Circuit. In California, there are now two different and conflicting sets of rules which can be invoked in analyzing the constitutionality of a restriction on newsracks. Under the Federal Ninth Circuit's opinion in *Jacobsen v. United States Postal Service*, 812 F.2d 1151 (9th Cir. 1987), a case involving restrictions on newsracks, the court stated "[t]he government . . . must justify reasonable time, place, and manner restrictions on the use of [public] sidewalks." (*Id.* at 1153.)

Under the state court of appeal's decision in the

instant case, however, the government does not have the burden of proof; the person challenging the restriction has the "burden of establishing that the ordinance . . . results in an unreasonable restriction upon the exercise of constitutional guarantees."

This type of conflict within the same state does not comport with either constitutional law or judicial policy. Individuals are entitled to pursue a 42 U.S.C. Section 1983 claim in state court. *Martinez v. California*, 444 U.S. 277 (1980). They should not be punished for doing so by having the burden of proof placed on them instead of the government. Furthermore, California's federal courts clearly have little interest in a state court decision which increases the federal caseload by encouraging plaintiffs to sue in federal court.

CONCLUSION

For the foregoing reasons, this Court should give plenary consideration to this appeal.

Respectfully submitted,

Robert Mann, *Counsel of Record*

Donald W. Cook

Attorneys for Appellants

Paul and Eunice Duffy

ORDINANCE NO. 1615
AN ORDINANCE OF THE CITY OF ARCADIA AMENDING SECTION 6439 OF THE ARCADIA MUNICIPAL CODE PERTAINING TO UNATTENDED NEWSPAPER RACKS

THE CITY COUNCIL OF THE CITY OF ARCADIA DOES ORDAIN AS FOLLOWS:

SECTION 1. Section 6439 of the Arcadia Municipal Code is hereby amended to read as follows:

"6439. Unattended Newspaper Racks. The vending of newspapers from unattended coin-operated vending machine, hereafter referred to as a news rack, placed on a public sidewalk, shall be permitted in accordance with the regulations of this section:

(1) No person shall install or maintain a news rack or mount therefor without first obtaining a permit from the Business License Officer and without complying with the regulations of this section.

(2) An applicant for a permit shall file with the Business License Officer an application which shall contain:

(a) The name, address and telephone number of the person who owns the business of placing and maintaining the news racks and mounts.

(b) The signature of the owner of the business.

(c) The location of each news rack and mount to be placed and maintained.

(d) The name of the newspaper to be sold from the news rack.

(e) Plans showing the proposed position of news racks and pedestals at a given location.

(3) The Business License Officer shall issue a permit to any applicant who complies with the regulations of this section.

(4) The permittee shall notify the Business License Officer in writing of any change in the name, status, telephone number or address of permittee as shown in the permit application within ten (10) days after such change takes place.

(5) The permittee shall maintain public liability insurance covering personal injury and property damages arising out of the use, ownership and maintenance of the news racks in the amount of $300,000.000 single limit per occurrence with the City of Arcadia named as an additional insured in a form and with content approved by the City Attorney. Evidence of insurance shall be filed with the City Attorney before the permit is issued. The insurance shall provide that cancellation shall be effective only after twenty (20) days' written notice thereof delivered to the Business License Officer of City.

(6) News racks shall not be placed:

(a) Within three (3) feet of any marked crosswalk.

(b) Within fifteen (15) feet of the curb return of any unmarked crosswalk.

(c) Within five (5) feet of any fire hydrant, fire call box, police call box or other emergency facility.

(d) Within five (5) feet of any driveway.

(e) Within five (5) feet ahead of and twenty-five (25) feet to the rear of any sign marking a designated bus stop.

(f) Within six (6) feet of any bus bench.

(g) At any location whereby the clear space for the passageway of pedestrians is reduced to less than six (6) feet.

(h) Within three (3) feet of any area improved with lawn, flowers, shrubs or trees or within three (3) feet of any display window of any building abutting the sidewalk or parkway or in such manner as to impede or interfere with the reasonable use of such window for display purposes.

(7) News racks shall be so placed and maintained that they do not:

(a) Endanger the safety of persons or property.

(b) Interfere with any governmental use of the sidewalk.

(c) Unreasonably interfere with pedestrians, including persons leaving and entering motor vehicles.

(d) Interfere with the ingress or egress of private property.

(e) Interfere with the use of mailboxes or traffic signals.

(8) A news rack may be placed and maintained at a location selected by the applicant, provided it complies with the provisions hereof. A location as used herein means thirty (30) feet of public sidewalk.

(a) The thirty (30) feet may be linear in form in which it will parallel the length of the adjacent curb, or

(b) Form an L-shaped grouping where such a grouping may be deemed necessary by the Business License Officer.

(c) A location shall contain one or more lawfully maintained news racks, but not more than can be placed and maintained in accordance with the regulations of this section.

(d) A location shall be one hundred (100) feet or more from another location except that said one hundred feet shall not be measured across a street, other than an alley.

(9) No news rack shall exceed four (4) feet in height, thirty (30) inches in width or two (2) feet in thickness.

(10) News racks shall be placed adjacent and parallel to the wall of a building and not less than six (6) inches nor more than eighteen (18) inches from the wall, unless the Business License Officer determines that placement near a building is not otherwise in conformance with the regulations of this section, in which case he may authorize placement near a curb if such placement would be otherwise in conformance with the regulations of this section. News racks placed near the curb must be placed parallel to and no less than eighteen (18) inches nor more than twenty-four (24) inches from the edge of the curb. No news rack shall be placed or maintained on the sidewalk opposite another news rack.

(11) News rack mounts shall be bolted in place in accordance with specifications provided by the Public Works Department.

(12) No news rack shall be used for advertising signs or publicity purposes other than that dealing with display, sale or purchase of the newspaper sold therein. There shall be no advertising on wood grain panels.

(13) Each news rack and mount shall be maintained in a clean, neat and attractive condition and in good repair at all times.

(14) News racks or mounts not conforming to thirteen (13) above, may be cleaned or repaired by order of the Business License Officer and the owner

required to reimburse the City the actual cost of repair or cleaning if within ten (10) days after notice is mailed to the permittee to clean or repair, the permittee has failed to do so. Any permittee receiving such notice may, within said ten (10) day period, request in writing an informal hearing before the Business License Officer, the date, place and time of which shall be set by the Business License Officer.

(15) Each news rack shall display, in an easily readable manner, the current name and current telephone number of the permittee.

(16) The Business License Officer will have supervision over the placement, maintenance and removal of all publication vending machines on public sidewalks in the City of Arcadia.

(17) By January 1, 1978, each news rack shall be mounted on a separate pedestal conforming to the physical specifications kept on file by the Business License Office in the Finance Department, except those news racks presently legally existing on the sidewalks in conformance with subsection (24) herein which have modular mounts need not conform with the pedestal mount requirement of this subsection until December 1, 1978.

(18) News racks shall have wood grain panels and the mount shall be painted gloss black.

(19) All news racks on a tray mount must be of

the same type.

(20) Each vendor may have no more than two machines in any one location; in some instances, depending upon space available, the vendor may be limited to a single installation.

(21) The vendors shall pay the cost of the news racks and mounts and the cost of their installation.

(22) In the event a vendor desires to no longer vend in a specific location, seven days' notification must be given to the Business License Officer prior to removal of the news rack or mount.

(23) The Business License Officer may solicit other licensed vendors for requests to fill vacant positions. The selection will be made by lottery.

(24) Each news rack shall conform to the physical specifications kept on file by the Business License Officer in the Finance Department by January 1, 1978.

(25) Vendors will choose among themselves the contractor they wish to install the pedestals and news racks in conformance to this section.

(26) All news racks and mounts that do not comply with this section shall be moved to comply or removed from the public sidewalk.

(27) The installing contractor will be responsible for the collection of the fees. If the installing contractor is unable to reach a satisfactory arrangement with a vendor for the installation of the pedestal, the

contractor may eliminate that vendor from the location.

(28) Any news racks installed, used or maintained in violation of the provisions of this Section may be removed and stored in any convenient place by any officer of the City. Seven days prior to removal, written notice of the violation shall be given by attached notice of violation to the news rack and mailed to the permittee's address on file with the Business License Officer. Any person may request in writing within said seven-day period an informal hearing before the Business License Officer at a time, date and place to be specified by the Business License Officer. If the violation is not corrected during the seven (7) day period, the rack shall be removed, held as evidence or disposed of as unclaimed property in possession of the Police Department. The City Manager shall cause inspection to be made of any news rack reinstalled after removal under this subdivision. The permittee of said news rack shall be charged a ten dollar ($10.00) inspection fee for each news rack so inspected.

(29) In the event that nay news rack is abandoned or is not serviced with the publication it is designed to disseminate for a period of over seven (7) days, the City may remove same pursuant to the procedure set out in subdivision (28). Abandonment shall include but is not limited to circumstances where no publication is in the rack for a period of over seven (7) days.

SECTION 2. No person shall violate any provision, or fail to comply with any of the requirements of this ordinance. Any person violating any of the provisions or failing to comply with any of the mandatory requirements of this ordinance shall be guilty of a misdemeanor. Any person convicted of a misdemeanor under any provision of this ordinance shall be punishable by a fine of not more than Five Hundred Dollars, or by imprisonment in the City Jail or County Jail for a period not exceeding six months, or by both such fine and imprisonment. Each such person shall be guilty of a separate offense for each and every day during any portion of which any violation of any provision of the ordinance is committed, continued, or permitted by such person and shall be punishable accordingly.

SECTION 3. In addition to the penalties provided in the preceding Section, any condition caused or permitted to exist in violation of any of the provisions of this ordinance shall be deemed a public nuisance and may be, by the City, summarily abated as such, and each day such condition continues shall be regarded as a new and separate offense.

SECTION 4. If any section, subsection, sentence, clause, phrase or portion of this ordinance is, for any reason, held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such

decision shall not affect the validity of the remaining portions of this ordinance. The City Council of the City of Arcadia hereby declares that it would have adopted this ordinance and each section, subsection, sentence, clause, phrase or portion thereof irrespective of the fact that any one or more sections, subsections, sentences, clauses, phrases or portions be declared invalid or unconstitutional.

SECTION 5. Neither the adoption of this ordinance nor the repeal hereby of any ordinance shall in any manner affect the prosecution for violation of ordinances, which violations were committed prior to the effective date hereof, nor be construed as affecting any of the provisions of such ordinance relating to the collection of any such license or penalty or the penal provisions applicable to any violation thereof, nor to affect the validity of any bond or cash deposit in lieu thereof, required to be posted, filed or deposited pursuant to any ordinance and all rights and obligations thereunder appertaining shall continue in full force and effect.

SECTION 6. The Clerk of the Council shall certify to the passage and adoption of this ordinance and shall cause the same to be published in the official newspaper of the City of Arcadia within fifteen (15) days after its adoption.

PASSED AND ADOPTED by the City Council of the

City of Arcadia at its regular meeting held on the 1st day of November, 1977.

SIGNED AND APPROVED this 1st day of November, 1977.

/s/ JACK SAELID

Mayor of the City of Arcadia

ATTEST:

/s/ CHRISTINE VAN MAANEN

City Clerk

MICHAEL H. MILLER, CITY ATTORNEY
CITY OF ARCADIA
240 W. Huntington Drive
Arcadia, California 91006
(818) 574-5407
BURKE, WILLIAMS & SORENSEN
PETER M. THORSON
624 So. Grand Ave., #1100
Los Angeles, California 90017
(213) 623-1900

Attorneys for Defendant,
CITY OF ARCADIA,

FILED
FEB 20 1986
FRANK S. ZOLIN, County Clerk
BY C. PENA, DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

PAUL DUFFY and EUNICE DUFFY, Plaintiffs, vs. CITY OF ARCADIA, a Municipal Corporation, Defendant.	CASE NO. C 528746 JUDGMENT AFTER TRIAL BY COURT

The above action came on regularly for trial on January 29 1986, at 9:00 A.M. Plaintiffs appeared through their attorney, Linda T. Abrams, and defendant appeared through its attorneys, Michael H. Miller and

Peter M. Thorson. A jury trial having been duly waived, the Court having heard and considered the testimony and the argument of counsel, the matter having been submitted for decision, and a statement of decision not having been requested,

IT IS ADJUDGED THAT:

The defendant has prevailed on the grounds that:

1. Section 6439 of the Arcadia Municipal Code (as amended), pertaining to unattended newspaper racks is, except for Section 6439 (24), a valid ordinance, and does not violate the First Amendment of the United States Constitution and Article I, Section 2 of the California Constitution. The phrase "neat, clean and attractive" contained in the ordinance shall be construed as "neat and clean" so as to eliminate any subjective element of the term "attractive."

2. Defendant is, however, enjoined from initiating any enforcement proceedings based solely upon Subsection 24 of Section 6439 of the Arcadia Municipal Code.

3. Section 6439 of the Arcadia Municipal Code

does not violate the Sherman Antitrust Act, 15 U.S.C. Sections 1-7.

4. The City is not subject to and Section 6439 does not violate the Cartwright Act, Bus. and Prof. Code Section 16720.

5. Defendants shall recover costs in the amount of $_____ for costs and disbursements incurred herein.

6. The Preliminary Injunction is dissolved forthwith.

DATED: February 26, 1986.

/S/ Dowds

Honorable Norman Dowds

Judge of the Superior Court

Judgment entered on _____, 19__, in the Judgment Book, Volume No. _____, Page _____.

_____, Clerk

By_____, Deputy

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

PAUL DUFFY and
EUNICE DUFFY,

Plaintiffs and
Appellants,

v.

CITY OF ARCADIA, a
municipal corporation,

Defendant and
Respondent.

B 019050

(Super.Ct.No. C528 746)

COURT OF APPEAL-SECOND DIST.
FILED
MAR 3 1 1987
CLAY ROBBINS, JR. Clerk
Deputy Clerk

Plaintiffs Paul and Eunice Duffy, newspaper distributors, appeal from the judgment entered in favor of defendant City of Arcadia (City) declaring that subdivision 9 of Arcadia Municipal Code section 6439, which sets a height limit for newspapers racks, is constitutional. We affirm.

I.

FACTS AND PROCEDURAL BACKGROUND

In 1977, City adopted Municipal Code section 6439 to regulate the size, placement and condition of newspaper racks on its streets. Although plaintiffs then distributed newspapers in City, they brought no legal challenge to the newly enacted ordinance.

In 1983, City discovered that at an unknown time, plaintiffs had replaced their formerly conforming newspaper racks with 18 double deck newspaper racks at eight different locations in City. The new five feet high racks violated subdivision 9 of Arcadia Municipal Code section 6439 which states: "No news rack shall exceed four (4) feet in height, thirty (30) inches in width or two (2) feet in thickness."

In 1984, City wrote to plaintiffs, informing them that the news racks violated the local height limits and asking them to remedy the matter.

Plaintiffs responded by filing suit for declaratory and injunctive relief, alleging the ordinance was unconstitutional on various grounds. The trial court

first issued a temporary restraining order in favor of plaintiffs and subsequently granted them a preliminary injunction. However, after a plenary trial on the merits, the superior court dissolved the preliminary injunction, concluded that the ordinance violated neither state nor federal constitutional guarantees, and entered judgment in favor of City.[1]

Plaintiffs thereafter appealed and sought from this court a writ of supersedeas to restrain City from enforcing the ordinance during the pendency of the instant appeal. We summarily denied the request whereupon plaintiffs sought relief in the California Supreme Court. That court issued a writ to restrain

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[1] Relying upon Kash Enterprises, Inc. v. City of Los Angeles (1977) 19 Cal.3d 294, 305, the superior court construed subdivision 13 of the ordinance which mandates that news racks be "clean, neat and attractive" to merely mean "clean and neat" in order to eliminate any constitutional problems of vagueness and arbitrary application.

The trial court also enjoined City from enforcing subdivision 24 which states that each news rack "shall conform to the physical specifications kept on file by the Business License Officer in the Finance Department by January 1, 1978."

City does not contest either of those rulings.

City from enforcing the ordinance "to remove or to require the removal of [plaintiffs'] news racks" pending final determination of this appeal.

II.

DISCUSSION

While it is well settled that public distribution of newspapers and periodicals through news racks falls within the ambit of constitutional protections (Kash Enterprises, Inc. v. City of Los Angeles, supra, 19 Cal.3d 294, 302 and cases cited therein), it is equally well established that a local municipality retains authority to impose reasonable time, place and manner regulations upon the use of news racks so as to protect legitimate state interests. (Id., at pp. 302-303 and cases cited therein.) As the challenged portion of City's ordinance is undisputedly "content neutral," it will be upheld if clearly and narrowly drawn so as to avoid arbitrary and unnecessary curtailment of the constitutional guarantees of freedom of the press and freedom of speech. (Id., at p. 303.) And inasmuch as the thrust of plaintiffs' contention at trial was that application of the ordinance would result in an unreasonable limitation on the dissemination of protected ideas, we examine the evidence adduced therein.

The Arcadia City Council adopted the subject ordinance following a public hearing. Remarks from

both the City Attorney who explained the reasons for drafting of the ordinance and the City Council members who discussed the ordinance establish its general purposes were to improve public safety and to enhance the aesthetic quality of the City. Regulations to further those two goals fall within the permissible bounds of the police power of a city. (Metromedia Inc., v. San Diego (1981) 453 U.S. 490, 507-508; Southern N.J. Newspapers v. State of N.J. etc. (1982) 542 F.Supp. 173, 185; Philadelphia News, Inc. v. Borough C., etc., Swathmore (1974) 381 F.Supp. 228, 244.) And evidence was presented that news racks were available which would conform to the ordinance's requirements, a fact plaintiffs have never disputed.

On this appeal, plaintiffs place much emphasis on the fact that the City Council did not articulate each specific argument City now makes as to how the ordinance furthers those legitimate state interests. There is no such requirement. An ordinance need not recite all of the specific reasons for its enactment.[2] (5

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[2] Significantly, nothing in the record of the City Council proceedings indicates that the enactment of the ordinance was in any way prompted by inappropriate motives such as a desire to prevent the dissemination of "unpopular ideas," or an intent to drive particular individuals out of business.

McQuillan, Municipal Law, section 16.15, p. 141.)

At bench, it is self-evident a row of news racks higher than four feet could obstruct the view of a pedestrian, posed to step into the street, of low-riding sportscars or children on bicycles, or that those racks could make it difficult for drivers in the street to see a person emerging from behind them. Equally obvious is that the aesthetic quality of the environment could be improved by standardizing the size, shape, and maintenance of the news racks. We therefore conclude that, on its face, the ordinance passes constitutional muster as it was properly enacted to further legitimate governmental concerns and leaves open adequate alternative channels of communication. (Schad v. Mt. Ephraim (1981) 452 U.S. 61, 75-76.)

To avoid the force of this last conclusion, plaintiffs attempted to convince the trial court that application of the ordinance resulted in a constitutionally deficient law. In that regard, they urged that the City's prohibition on news racks higher than four feet precluded them from using double deck news racks which allegedly are more economically feasible for distribution of lesser known and established newspapers because two different periodicals can be

placed in one news rack.[3] While plaintiffs conceded that conforming one-level news racks were available from at least two different manufacturers, they asserted the purchase and installation of those racks would result in an increased cost of 50%. Moreover, they claimed that at six of their 18 news rack locations, no additional legal sidewalk space remained so that if they were forced to remove their double deck racks, half of the papers sold there would be forced to relocate to less commercially productive locations. Paul Duffy declared: "I personally know of at least two former distributors of small newspapers who did quit distributing in Arcadia when this ordinance came in because they could not afford to comply with the new model requirements or to challenge them in suits: The Martynecs and the former Free Press distributor."

We find plaintiffs' purported evidentiary showing inadequate. The last quoted declaration was patently grounded upon inadmissible hearsay. But of even more significance was plaintiffs' failure to tender declarations from the individuals referenced therein. These were people with whom plaintiffs were personally acquainted

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[3] Plaintiffs' argument in this regard is somewhat undercut by their concession that double deck news racks were originally designed to accommodate The Wall Street Journal and Barrons.

and who allegedly could have substantiated plaintiffs' claim that application of the ordinance resulted in an impermissible restriction on dissemination of constitutionally protected matter. However, plaintiffs, without explanation, offered no declarations or testimony from them. "If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust." (Evid. Code, section 412.)

Viewed in this context, plaintiffs' earlier noted generalized claims that the increase in cost and relocation of news racks which would flow from compliance with the ordinance would unreasonably impinge upon the dissemination of ideas must fail as being vague, speculative, and conclusionary. At best, plaintiffs established that compliance with the ordinance may necessitate additional expenditures. But that fact, be it a fact, falls far short of discharging plaintiffs' burden of establishing that the ordinance as applied results in an unreasonable restriction upon the exercise of constitutional guarantees.

III.

The judgment is affirmed.

NOT FOR PUBLICATION */

_____, P.J.

ROTH

We concur:

_____, J.

COMPTON

_____, J.

FUKUTO

*/ On September 17, 1987, the California Supreme Court ordered the Court of Appeal decision published in the Official Reporter. See A-27

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
CLAY ROBBINS, JR., CLERK

DIVISION: 2 DATE: 04/23/87

Law Offices of Donald W. Cook
Donald W. Cook
1416 Second Street
Santa Monica, CA 90401

B019050

RE: Duffy, Paul and Eunice Duffy
vs.
Arcadia, City of (Et Al)

2 Civil B019050
Los Angeles No. C528746

APR 23 1987

PETITION FOR REHEARING DENIED

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

2nd District, Division 2, No. B019050
S000942

SUPREME COURT
FILED
JUL - 1 1987
Laurence P. Gill, Clerk
DEPUTY

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

DUFFY et al.

v.

CITY OF ARCADIA, etc.

Appellants' petition for review DENIED

/S/ LUCAS
Chief Justice

United States Supreme Court No. _____
California Supreme Court No. S000942
Court of Appeal No. 2d Civil B019050
Los Angeles Superior Court No. C 528 746

PAUL DUFFY and EUNICE DUFFY,

Appellants,

v.

CITY OF ARCADIA, a municipal corporation,

Appellees.

Received for filing in
Clerk's Office
Court of Appeal
Second Appellate District
JUL 29 1987

Notice is hereby given that Paul Duffy and Eunice Duffy hereby appeal to the United States Supreme Court from the final judgment of the Court of Appeal entered March 31, 1987, hearing denied by the California Supreme Court on July 1, 1987, which affirmed the trial court decision that sustained the validity of City of Arcadia Ordinance No. 1615 under the First Amendment of the United States Constitution. This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

DATED:

/S/ Donald W. Cook
Donald W. Cook
Attorney for Appellants

No. 2/2 B019050/S000942

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

SUPREME COURT
FILED
SEP 17 1987
Lawrence P. Gill, Clerk
DEPUTY

DUFFY

v.

CITY OF ARCADIA

On the recommendation of the Court of Appeal pursuant to Rule 978 of the California Rules of Court, the Reporter of Decisions is directed to publish the opinion in the above-entitled case in the Official Reports. See subdivision (c) of Rule 978, California Rules of Court.

/S/ LUCAS
Chief Justice

SUPREME COURT OF THE UNITED STATES

No. A-291

PAUL DUFFY AND EUNICE DUFFY,

Applicants,

v.

CITY OF ARCADIA, ETC.

ORDER

UPON CONSIDERATION of the application of counsel for the applicants,

IT IS ORDERED that the time for docketing an appeal in the above-entitled cause be, and same is hereby, extended to and including October 29, 1987.

/S/ Sandra D. O'Connor
Associate Justice of the
Supreme Court of the
United States

Dated this 14th
day of October, 1987.

(2)

Supreme Court, U.S.
FILED
FEB 4 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-747

In The

Supreme Court of the United States

October Term, 1987

PAUL DUFFY and EUNICE DUFFY,

Appellants,

v.

CITY OF ARCADIA,

Appellee.

ON APPEAL FROM THE CALIFORNIA COURT OF APPEAL SECOND APPELLATE DISTRICT

MOTION OF APPELLEE CITY OF ARCADIA TO DISMISS

MICHAEL H. MILLER,
City Attorney*
City of Arcadia; and
BURKE, WILLIAMS & SORENSEN
PETER M. THORSON
VIRGINIA R. PESOLA
624 South Grand Avenue, Suite 1100
Los Angeles, California 90017
(213) 623-1900

Attorneys for Appellee
CITY OF ARCADIA

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

42pp

QUESTION PRESENTED

Is a four-foot limit on the height of newsracks located on public property a reasonable time, place and manner regulation?

TABLE OF CONTENTS

	Page
INTRODUCTORY STATEMENT	1
STATEMENT OF FACTS	2
ARGUMENT	5
I. THE APPEAL SHOULD BE DISMISSED BECAUSE THE CASE IS MOOT	5
II. THE CHALLENGED HEIGHT PROVISION IS A REASONABLE TIME, PLACE AND MANNER REGULATION	6
A. The Lawsuit Involves The Height, Not The Style, Of Newsracks	6
B. A Four-Foot Limit On The Height Of Newsracks Meets The Test For A Content-Neutral Regulation	7
III. THE INQUIRY FOR FIRST AMENDMENT PURPOSES IS NOT CONCERNED WITH ECONOMIC IMPACT	10
CONCLUSION	12
APPENDIX	App. 1

TABLE OF AUTHORITIES

Page

CASES

ACORN v. City of Phoenix, 798 F.2d 1260 (9th Cir. 1986) 8, 11

Braunfield v. Brown, 366 U.S. 599 (1963) 11

City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) 2, 8, 9, 11

City of Lakewood v. Plain Dealer Publishing Co., No. 86-1042 1

City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) 2, 8, 10, 11, 12

Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) 2, 10, 12

Dills v. City of Marietta, Ga., 674 F.2d 1377 (11th Cir. 1982) 9

Duffy v. City of Arcadia, 195 Cal.App.3d 308, — Cal. Rptr. —, — P.2d — (1987) 7

Jacobsen v. United States Postal Service, 812 F.2d 1151 (9th Cir. 1987) 9

Kovacs v. Cooper, 336 U.S. 77 (1949) 11

Lakewood, Ohio Cong. of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303 (6th Cir. 1983) 11

Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) 2

Rogers v. City of Arcadia, No. CV 87-03450 (Kn) 4

Tiverton Bd. of License Comm'rs v. Pastore, 469 U.S. 238 (1985) 5, 6

Young v. American Mini Theatres, 427 U.S. 50 (1976) 10

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES

CITY OF ARCADIA MUNICIPAL CODE

Section 6439 2

Subsection 6439(9) 2, 3, 6

Subsection 6439(18) 6

Subsection 6439(24) 3, 7

No. 87-747

In The

Supreme Court of the United States

October Term, 1987

PAUL DUFFY and EUNICE DUFFY,

Appellants,

v.

CITY OF ARCADIA,

Appellee.

ON APPEAL FROM THE CALIFORNIA COURT OF APPEAL SECOND APPELLATE DISTRICT

MOTION OF APPELLEE CITY OF ARCADIA TO DISMISS

INTRODUCTORY STATEMENT

Because of Appellant Duffy's voluntary compliance with the regulation challenged, the case has become moot. If the Court determines the case is not moot, the only issue properly before the Court is whether Appellee City of Arcadia's regulation of the height of newsracks is a reasonable time, place and manner regulation. Unlike the other newsrack case pending before the Court, *City of Lakewood v. Plain Dealer Publishing Co.*, No. 86-1042, the

within case does not present the issues of a ban on newsracks, standardless discretion to deny newsrack permits or any other limitation which impinges on a newsrack owner's ability to place newsracks on public, or private, property. The California Court of Appeal correctly determined that the height regulation is valid on its face and as applied to Duffy. This case does not present a substantial federal question because the state court's decision is consonant with the opinions of this Court analyzing content-neutral time, place and manner regulations, including *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490 (1981), *City Council v. Taxpayers for Vincent,* 466 U.S. 789 (1984), *Clark v. Community for Creative Non-Violence,* 468 U.S. 288 (1984) and *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41 (1986).

—o—

STATEMENT OF FACTS

On October 4, 1977, the City Council of the City of Arcadia held a public hearing to receive testimony on a proposed newsrack ordinance. Evidence was taken that newsracks obstruct pedestrian rights-of-way, obstruct vision between the sidewalk and the street, and present a disorderly and cluttered appearance. The City Council heard testimony from a number of newspaper owners and distributors. After hearing, the City Council enacted Ordinance No. 1615, codified as Arcadia Municipal Code Section 6439, regulating the size, placement and condition of unattended newsracks on public sidewalks (the "Ordinance").[1] Among its provisions is the four foot height limitation of subsection 6439(9) at issue on this appeal.

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[1] Portions of the Ordinance, not relevant here, were amended.

At the time the Ordinance was adopted, Duffy had been distributing newspapers in the City for over a decade in newsracks which conformed to the Ordinance. In November 1983, however, the City discovered that Duffy had removed 18 conforming newsracks in the City and had replaced them with newsracks which violated the Ordinance's height provision, not because they were so-called "Lowboy" (double-deck) newsracks, but because they were 5 feet high.

On July 20, 1984, and again on December 3, 1984, the City sent Duffy a letter advising him that the recently installed newsrack violated Section 6439(9) of the Arcadia Municipal Code relating to the height of newsracks (App. 1 through App. 4).[2]

On January 2, 1985, Duffy initiated this litigation seeking declaratory and injunctive relief on the grounds that the Ordinance violated the provisions of the state and federal Constitutions.

On January 29, 1986, the trial court held that the City had prevailed because the Ordinance did not violate the Constitution, except for subsection 24,[3] and denied Duffy's request for a permanent injunction.

Duffy appealed, challenging only the constitutionality of the height requirement of the Ordinance. On March 31,

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[2] At no time has the City asserted that Duffy's newsracks violated any provision of the Ordinance other than Section 6439(9).

[3] The Court of Appeal held subsection 24 to be invalid because it referenced "physical specifications kept on file"; however, such specifications (App. 5) have never been enforced (App. 7, 10, 11, 16).

1987, the California Court of Appeal filed an opinion upholding the facial and as applied validity of the height regulation. The Supreme Court denied Duffy's petition for review on July 1, 1987.

While Duffy's petition for review was pending before the California Supreme Court, a second action, *Rogers v. City of Arcadia*, No. CV 87-03450 (Kn), was filed in federal court on May 29, 1987, challenging the Ordinance on the same grounds as in state court. The District Court for the Central District of California granted the City's motion to dismiss on August 6, 1987, on the grounds of res judicata and collateral estoppel.

During the pendency of the litigation, injunctive orders were in effect which allowed Duffy to continue distributing newspapers in the nonconforming newsracks. In August, 1987, after losing in both state and federal courts, Duffy replaced all the nonconforming newsracks with ones that met the height requirement of the Ordinance. This was accomplished by mounting each of the previously nonconforming newsracks on shorter pedestals (Jurisdictional Statement at 7, n.5; App. 17, ¶ 6), an option which had been available to Duffy prior to and throughout the duration of this lawsuit (App. 18, 19, ¶ 5).

With the installation of the shorter pedestals, all of Duffy's newsracks substantially conform to the Ordinance. Duffy is now distributing his so-called "smaller less established" newspapers, as he has always been able to do, and as he has done, without interruption, since he began doing business in the City.

———o———

ARGUMENT

I.

THE APPEAL SHOULD BE DISMISSED BECAUSE THE CASE IS MOOT

In *Tiverton Bd. of License Comm'rs v. Pastore*, 469 U.S. 238 (1985), the Court held that a case involving liquor license revocation proceedings had become moot by the licensee's closing of business because no decision on the merits by the Court would have had any effect on the licensee's liquor license.

The sole issue in this lawsuit—the validity of the City's regulation of the height of newsracks—has become moot by Duffy's compliance with the height requirement of the Ordinance. After the decision of the Court of Appeal became final and the District Court action was dismissed, Duffy mounted the 18 nonconforming "Lowboy" newsracks on 8-inch pedestals. Shortly after Duffy replaced the pedestals, the City informed him, through his attorney, that the newsracks were in substantial compliance with the Ordinance, as placing the lowboy newsracks on 8-inch pedestals resulted in newsracks 49½-50 inches high (App. 20-21).

Because Duffy has complied with the Ordinance and continues to distribute newspapers in the City by means of Lowboy newsracks, a decision by this Court that the height regulation is invalid would have no effect on Duffy's distribution of newspapers in the City. Conceivably, Duffy could replace the recently installed mounts with the older, taller mounts if the height regulation were struck down, but "'"such speculative contingencies afford no basis

for . . . passing on . . . substantive issues . . . in the absence of 'evidence that this is a prospect of immediacy and reality' " ' ". *Tiverton*, 469 U.S. at 240. As a favorable decision by the Court would confer no tangible benefit on Duffy, the case should be dismissed as moot.

II.

THE CHALLENGED HEIGHT PROVISION IS A REASONABLE TIME, PLACE AND MANNER REGULATION

A. The Lawsuit Involves The Height, Not The Style, Of Newsracks

Duffy's assertions that this case involves the "style" of newsracks and that the Ordinance effectively permits only one style of newsrack are groundless. Nothing in the Ordinance prohibits the use of "Lowboy" newsracks.

The City's letter dated July 20, 1984, notifying Duffy that his newsracks violated the Ordinance, and which prompted Duffy to file the lawsuit, stated:

> The newsracks at the following locations in the City of Arcadia are in violation of the Arcadia Municipal Code, Section 6439(9). The Arcadia Municipal Code states "No newsrack shall exceed four (4) feet in height, thirty (30) inches in width or two (2) feet in thickness." The double racks you have installed measure five (5) feet in height. (App. 1.)

At no time did the City contend that Duffy violated subsection 6439(18) of the Ordinance.[4] Throughout the trial phase of the lawsuit, the City argued that "Lowboy"

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[4] Subsection 6439(18) provides: "Newsracks shall have wood grain panels and the mount shall be painted gloss black."

newsracks would be permitted as long as they met the dimensional requirements of the Ordinance (App. 9-10).

Subsection 24 of the Ordinance which referenced newsrack "specifications" and which was found unconstitutional by the trial court, was not an issue on appeal and has never been enforced (see footnote 3). Further, these specifications by their terms do not prohibit the use of "Lowboy" newsracks (App. 5).

Throughout the duration of the lawsuit, Duffy had the option of placing the "Lowboy" newsracks on shorter pedestals to comply with the height requirement of the Ordinance (App. 18, 19), as he ultimately did (App. 17, ¶ 6, 20-21). Both of Duffy's attorneys discussed this solution with the City Attorney prior to and during the course of this lawsuit (App. 22-24) but, for some inexplicable reason, Duffy chose to initiate and continue to pursue the lawsuit to its conclusion rather than to use this inexpensive and readily available means to conform to the Ordinance.

B. A Four-Foot Limit On The Height Of Newsracks Meets The Test For A Content-Neutral Regulation

The California Court of Appeal correctly noted that the challenged portion of the Ordinance is undisputedly content-neutral. No evidence was presented at trial that the enactment of the Ordinance was in any way prompted by a desire to prevent the dissemination of "unpopular ideas." *Duffy v. City of Arcadia,* 195 Cal.App.3d 308, 311, 312 n.2, — Cal.Rptr. —, P.2d — (1987). (Jurisdictional Statement at A-18, A-19.)

As the Ordinance is content-neutral, the appropriate inquiry is whether it is designed to serve a substantial

government interest and allows for reasonable alternative avenues of communication. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41; *City Council v. Taxpayers for Vincent*, 466 U.S. 789.

The Ordinance was enacted for safety and esthetic purposes. Traffic and pedestrian safety are traditional and legitimate subjects of a City's exercise of its police power, sufficiently substantial to sustain regulation of First Amendment activities. *See, e.g., ACORN v. City of Phoenix*, 798 F.2d 1260, 1268-1270 (9th Cir. 1986).

Esthetics also has been determined to be a substantial governmental interest which is unrelated to the suppression of ideas: "It is well settled that the state may legitimately exercise its police powers to advance esthetic values." *Vincent*, 466 U.S. at 805.

In *Vincent*, when addressing whether an ordinance prohibiting the posting of signs on public property was narrowly tailored to accomplish the government's stated purpose, the Court found significant the fact that the signs which were prohibited by the ordinance were "the tangible medium of expressing the message that has the adverse impact on the appearance of the landscape . . . Here, the substantive evil—visual blight—is not merely a possible by-product of the activity, but is created by the medium of expression itself." *Vincent*, 466 U.S. at 810.

Like *Vincent*, in this case it is the medium of distributing the message, not the message itself, which is being regulated.

There is one significant difference between this case and *Vincent*. In *Vincent*, the ordinance which was upheld totally prohibited the plaintiffs from communicating with the public in a certain manner, and from this the Court

presumed that the ordinance diminished the total quantity of plaintiff's communication in the City. The Ordinance, in contrast, does not totally prohibit, nor diminish to the slightest degree, the ability of Duffy or any other person, to communicate in the City.

This is demonstrated by Duffy's action in conforming with the Ordinance merely by replacing the mounts on which the newsracks rest; apparently with little effort and expense. Alternatively, Duffy, and any other person, can distribute newspapers at any of the dozens of locations on private property in a conforming newsrack or in a nonconforming newsrack, an alternative avenue of communication which was found significant in *Vincent:* "[B]y not extending the ban to all locations, a significant opportunity to communicate . . . is preserved . . .". 466 U.S. at 811.

Duffy's reliance on *Jacobsen v. United States Postal Service,* 812 F.2d 1151 (9th Cir. 1987) and *Dills v. City of Marietta, Ga.,* 674 F.2d 1377 (11th Cir. 1982) is misplaced. In both those cases, the challenged regulation amounted to a total ban on a certain means of communication without support in the record of a compelling government interest. The Ordinance, unlike the federal statute in *Jacobsen,* does not "impose a substantial handicap on traditional use of a traditional public forum." *Jacobsen,* 812 F.2d at 1153. Unlike the record before the *Dills* court, the record here contains substantial evidence of esthetic and safety interests promoted by the challenged regulation.

Duffy's assertion that the City should be required to support the Ordinance by specific incidents of safety or

traffic hazard or injury caused by the newsracks has been repeatedly rejected by the Court. Similar arguments have been made to and rejected by the Court. *See, e.g., Clark v. Community for Creative Nonviolence,* 468 U.S. at 297. ["If the Government has a legitimate interest in ensuring that the National Parks are adequately protected, . . . and if the parks would be more exposed to harm without the . . . prohibition than with it, the ban is safe from invalidation under the First Amendment . . ."] and *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. at —, 89 L.Ed.2d at 40 ["The First Amendment does not require a city, . . . to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the City relies on is reasonably believed to be relevant to the problem that the City addresses."]

III.

THE INQUIRY FOR FIRST AMENDMENT PURPOSES IS NOT CONCERNED WITH ECONOMIC IMPACT

The mere fact that the Ordinance may make it more costly to do business does not amount to a First Amendment violation.

> "The inquiry for First Amendment purposes is not concerned with ecomonic impact; rather, it looks only to the effect of this ordinance upon freedom of expression." *Young v. American Mini Theatres,* 427 U.S. 50, 78 (1976) [Powell, J., concurring].
>
> * * *
>
> "[W]e have never suggested that the First Amendment compels the Government to ensure that adult theatres, or any other kinds of speech related businesses for that matter, will be able to obtain sites at

bargain prices." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. —, 87 L.Ed.2d at 42.

That there is no absolute entitlement to the least expensive forum has informed or been expressed in cases involving several other First Amendment contexts. (*See, e.g., Kovacs v. Cooper*, 336 U.S. 77 (1949) [prohibition of sound trucks]; *City Council v. Taxpayers for Vincent*, 466 U.S. at 812 and n. 30 [prohibition of posting signs on public property]; *Braunfield v. Brown*, 366 U.S. 599 (1963) [not a First Amendment violation if regulation makes practice of religious beliefs more expensive]; *Lakewood, Ohio Cong. of Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303 (6th Cir. 1983) [same]; *ACORN v. City of Phoenix*, 798 F.2d 1260 at 1271 [political group can be prohibited from engaging in most cost-effective method of fundraising].

The Court of Appeal correctly determined that Duffy had failed to discharge his burden of showing that the Ordinance unreasonably restricted any constitutional right because Duffy's evidence showed at most that compliance with the Ordinance may necessitate additional expenditures. The Ordinance permits Duffy to distribute newspapers at any one of the scores of permissible locations on public property as well as any one of the dozens of locations on private property. The above cases demonstrate that any increased expense of doing business is not a First Amendment concern where, as here, Duffy is left with ample alternative avenues of communication.

Duffy's assertion that the Court of Appeal erroneously placed the burden of proof on him to demonstrate the invalidity of the Ordinance is based on a misconstruction of the Court of Appeal's opinion. It is well-settled, as

the Court of Appeal recognized, that the burden is on the government to establish that a content-neutral time, place and manner regulation is designed to serve a substantial governmental interest and does not unreasonably limit alternative avenues of communication. *See City of Renton v. Playtime Theatres, Inc.*, 89 L.Ed.2d at 37, 39. It is apparent when the Court of Appeal's comment on evidentiary burdens is read in context that it was not referring to the burden of justifying the Ordinance. Rather, the Court of Appeals was commenting on the complete lack of evidentiary support in the record that Duffy would be harmed by enforcement of the Ordinance. As noted by this Court in *Clark v. Community for Creative Nonviolence,* "one seeking relief bears the burden of demonstrating that he is entitled to it." 468 U.S. at 293, n.5. That Duffy was not harmed by the Ordinance and that the Ordinance did not impinge on any First Amendment right is further supported by Duffy's action in using the simple expedient of replacing the mounts which has permitted him to continue to distribute newspapers from the same number of newsracks in the same locations as he had been doing prior to adoption of the Ordinance.

CONCLUSION

This case does not merit further expenditure of the Court's time. The Ordinance now, as it always did, allows "Lowboy" newsracks if they meet the height and other dimensional requirements of the Ordinance. Duffy's conduct in placing his "Lowboy" newsracks on shorter

pedestals has made the controversy academic. It has also negated Duffy's claims that the Ordinance's effect is "to drive out of Arcadia those smaller, less established newspapers that depend upon lowboy newsracks" or "severely handicap the distribution of certain newspapers" (Jurisdictional Statement at 13). Duffy's ability to distribute newspapers in "Lowboy" newsracks is not now and has never been affected in any way by the Ordinance. Duffy continues to distribute newspapers in the City in the same time, place and manner as he has been doing prior to and since the adoption of the Ordinance.

The height regulation—the only regulation which can be the subject of this appeal—is justified by safety and esthetic interests and has not in any way curtailed First Amendment rights. The City's motion to dismiss should be granted.

DATED: February 3, 1988

Respectfully submitted,

MICHAEL H. MILLER,
City Attorney*
City of Arcadia; and
BURKE, WILLIAMS & SORENSEN
PETER M. THORSON
VIRGINIA R. PESOLA
624 South Grand Avenue, Suite 1100
Los Angeles, California 90017
(213) 623-1900

Attorneys for Appellee
CITY OF ARCADIA

*Counsel of Record

APPENDIX

ARCADIA
(SEAL)

GEORGE J.
WATTS
Manager

CITY OF ARCADIA
240 West Huntington Drive
Arcadia, California 91006
(818) 574-5400

City Council
David S.
Hannah
Mayor
Donald D.
Pellegrino
Mayor Pro
Tempore
Charles E.
Gilb
Mary Young
Dennis A.
Lojeski
Christine
Van Maanen
City Clerk

Received
July 20, 1984

City of
Arcadia
City Attorney

July 20, 1984

Mr. Paul J. Duffy
Kimbo Distributors
123 Huntington Street
San Fernando, CA 91340

Dear Mr. Duffy:

The newsracks at the following locations in the City of Arcadia are in violation of the Arcadia Municipal Code, Section 6439 (9). The Arcadia Municipal Mode states "No newsrack shall exceed four (4) feet in height, thirty (30) inches in width or two (2) feet in thickness." The double racks you have installed measure five (5) feet in height.

59 W. Las Tunas Drive
1440 S. Baldwin Avenue
1045 S. Baldwin Avenue
924 S. Baldwin Avenue
855 S. Baldwin Avenue
820 S. Baldwin Avenue
41 Wheeler Avenue
7 E. Huntington Drive

According to the Arcadia Municipal Code, Section 6439 (28) newsracks installed in violation of the provisions of this Section may be removed and stored by the City. Newsracks at the listed locations have been tagged for violations and will be removed if corrections are not made by July 27, 1984.

If you have any questions please call the Business License Officer, 574-5430.

Sincerely,

Becky Pike
Business License Officer

bp

cc: Mike Miller, City Attorney

ARCADIA
(SEAL)

CITY OF ARCADIA
240 West Huntington Drive
Arcadia, California 91006
(818) 574-5407

Office of the
City
Attorney
MICHAEL
H. MILLER
City
Attorney

GEORGE J.
WATTS
Manager

December 3, 1984

Linda T. Abrams
Attorney at Law
991 W. Pico Blvd., Ste. 1000
Los Angeles, CA 90035

Re: Kimbo Distributors — City of Arcadia

Dear Ms. Abrams:

As you know, the newsracks of your client (Kimbo) located in the City of Arcadia are inconsistent with the height requirements imposed by the City's newsrack Ordinance. The so-called low-boy newsracks (double deck) all exceed the required height limit. Moreover, these newsracks have been placed in the City without a permit. Conforming newsracks should replace the low-boys and appropriate permits obtained.

Because of the logistics involved, we will accord your client until January 1, 1985 to provide conforming newsracks and obtain the appropriate permits. If this is not accomplished, a seven (7) day Notice to Remove will be sent out the week of January 1, 1985 and, if necessary, removal shall occur according to said Notice.

The City's Ordinance is a reasonable time, place and manner regulation, and it is hoped that your client will decide to comply with its requirements.

Please feel free to contact this office if there are any questions.

Yours truly,

/s/ Michael H. Miller
Michael H. Miller
City Attorney

MHM:lm
xc: City Manager
License Officer

App. 5

CITY OF ARCADIA
240 West Huntington Drive
Arcadia, California

December 1, 1977

SPECIFICATIONS FOR UNATTENDED NEWSPAPER RACKS

CITY OF ARCADIA

Each news rack to be mounted on a separate pedestal

No more than 4′ in height, 30″ wide and 2′ thickness

Racks to be of wood grained panels

Coin return

Racks to be K Jack model 100 miniview or National Newsvend Model 10 or equivalent.

Racks to be on K Jack Style mount or National Newsvend mount model 10 or equivalent.

Mounts to be bolted in place in accordance with specifications provided by the Public Works Department.

Mount to be painted gloss black.

SPECIFICATIONS FOR BOLTING NEWSRACKS TO CONCRETE

CITY OF ARCADIA

Drill holes (avoid subsurface utilities)

Put appropriate size expansion shield in hole

Appropriate size lag bolt

Bolt base to surface of concrete

J. Robert Sullivan
Business License Officer

SUPERIOR COURT OF THE
STATE OF CALIFORNIA FOR
THE COUNTY OF LOS ANGELES

PAUL DUFFY and EUNICE DUFFY,	)	
Plaintiffs,	)	
vs.	)	No. C 528 746
CITY OF ARCADIA, et al.,	)	
Defendants.	)	

REPORTER'S TRANSCRIPT ON APPEAL

January 29, 1986

APPEARANCES:

For the Plaintiffs:

LINDA T. ABRAMS
9911 West Pico Boulevard
Suite 1000
Los Angeles, California 90035

For the Defendants:

MICHAEL H. MILLER, City Attorney
City of Arcadia
240 West Huntington Drive
Arcadia, California 91006

BURKE, WILLIAMS & SORENSEN
By: PETER M. THORSON
624 South Grand Avenue
Eleventh Floor
Los Angeles, California 90017

YVONNE ENGHOLM, CSR No. 2160
Official Reporter

* * *

(p. 21) one of the footnotes in Kash indicates that they had the same depth and width requirement, the wood grain panels, the same locational requirements. The only difference there was the fact that there was a five-foot height requirement rather than a four-foot height requirement.

Second of all—

THE COURT: Did they require a particular design of rack?

MR. THORSON: The ordinance did not require a particular design, nor did the Arcadia ordinance require a particular design.

The specifications that plaintiffs' counsel referred to have not been enforced and have essentially been repealed by the City for a number of years.

THE COURT: Well, you do still have physical specifications on file in the business license office?

MR. THORSON: No, we don't.

The declaration of Becky Pike, who is the business license officer, indicated that, that the set of specifications has not—has not been applied, nor has it been enforced for a long time.

THE COURT: So you dispute the contention that Miss Abrams was advancing that it is necessary for anyone desiring to sell newspapers to have this type that has a big storage area?

MR. THORSON: That is correct.

The requirements of the ordinance say that the height shall be a maximum of four feet, that the depth shall (p. 22) be a maximum, certain maximum, and the width a certain maximum. That's to prevent huge newsracks that take up too much space on the sidewalk.

THE COURT: What about—excuse me for interrupting. What about, isn't there a requirement that all racks be of the same type?

MR. THORSON: When they are on a particular mount. In other words, if you have one pedestal and three racks, then those three racks have to be of the same type.

THE COURT: But you can build another pedestal?

MR. THORSON: That is correct.

Also, their arguments falls down when they say that Lowboy—that the double-decker newsrack that's in dispute is the answer for all of the small papers, that if you look at the pictures of it, has a large box on the bottom that is capable of supporting a great many newspapers. Then it has a small box on top. There is nothing in that that prevents a distributor or a manufacturer from constructing a newsrack that has two of the smaller boxes.

If the essential part of their argument is you need to have two boxes for two different newspapers, there is nothing in the Arcadia ordinance that prevents that from occurring. The only problem is that there is not a—the distributors have not constructed such a newsrack and have not installed it, but it is not a limitation of the ordinance that prevents that from occurring.

The ordinance was designed in the legislative history and indicates that the City Council was concerned

* * *

(p. 25) have two or three or four newsracks that sit there.

THE COURT: But the vender normally constructs a pedestal; is that correct??

MR. THORSON: That is correct.

THE COURT: And then he either constructs it for one or for a number of racks, depending upon what he has to sell?

MR. THORSON: That is correct, and whatever other agreements he may have entered into with other venders.

THE COURT: Well, in your interpretation, paragraph (17), which you say is not being enforced, relates only to the physical specifications of the pedestal; is that right?

MR. THORSON: That is correct.

THE COURT: Well, is there something else that requires the newsrack to be of a certain height?

MR. THORSON: No. That's our point entirely.

There are dimensional maximum figures that indicate that the newsrack may not be bigger than a certain amount. There is the requirement of the color and the color of the base. But within those parameters, there is nothing that says you can only have a particular type of newsrack.

Granted, the specifications at one time said, "The K-Jack Model 100 or its eqiuvalent," but those words there, "or equivalent," are critical.

If the market changes and other newsracks come on line that can conform to those requirements, that's the official word from the City under that now repealed regulation that those would be acceptable.

THE COURT: All right.

(p. 26) (24) says:

"Each news rack shall conform to the physical specifications kept on file . . . "

And you say there are no physical specifications?

MR. THORSON: That is correct.

MS. ABRAMS: There is disagreement in the record as to that, Your Honor.

MR. THORSON: Well, if I can address that, the declaration of plaintiffs' attorney, Linda Abrams, says she contacted the business license officer and asked for it or was told those specifications were in effect.

You also have a direct declaration from the business license officer saying, we don't enforce those regulations anymore.

And I think that the direct declaration of the business license officer is entitled to significantly more weight because there is nothing in the record that indicates what questions were asked of the business license officer, and I think you are going to get a different answer from the business license officer based on how the question is phrased.

If you say, can I see what regulation you have, then naturally, you are going to be handed regulations that were adopted in 1977.

If you say, what regulations are currently enforced as of December 1984, that's a totally different answer, and those verifications aren't reflected in Miss Abrams' declaration.

What is reflected in the declaration of Becky (p.27) Pike is the fact that those regulations are not in effect and have not been enforced for a number of years.

THE COURT: All right.

Miss Abrams, do you want to close?

MS. ABRAMS: Yes, Your Honor.

The Burbank litigation has been cited to this court, which resulted in a permanent injunction by Judge Murphy, as well, as the preliminary injunction and TRO's earlier granted, said on its face that the K-Jack Model 100 was required. As soon as that was enjoined, cities began trying to do factually what Arcadia has done here.

Alhambra's ordinance and Los Angeles' said—in fact, and it's just in the Council meeting transcribed here—said, we are going to require the Model 100 Miniview, but there is some litigation on that, so we are going to set up specs that only the Model 100 can match.

Quoting from the legislative history of Arcadia ordinance, page 6, line 25, to page 7, line 2—this is quoted at page 22 of my opening brief—City Attorney Liberto:

> "The ordinance does require that all existing newsracks on the street be of what is called the K-Jack Model 100 Miniviews or its equivalent."

It is therefore academic for us to discuss whether Becky Pike changed her story in response to the fact that this lawsuit was filed or not.

As to whether the physical specifications sheet

* * *

(p. 33) THE COURT: No.

I think, generally speaking, the Arcadia ordinance establishes reasonable time, place and manner regulations.

I think the words "clean, neat and attractive" should be construed, as was done in the Kash case, that "attractive" simply is an synonym for "clean and neat."

I do not think that even though Section (24) is not being enforced, that the existence of it on the books may provide something of a chilling effect. So I'm going to enjoin Section (24) of the ordinance.

But, I think, considering it as a whole, why—the City is the prevailing party; and if you'd prepare a form of judgment, please, Mr. Thorson.

MR. THORSON: I will, Your Honor. Thank you, Your Honor.

MR. MILLER: Thank you, Your Honor.

MS. ABRAMS: Your Honor—thank you, Your Honor.

Your Honor, may we ask that the judgment be stayed and preliminary injunction remain in effect for a very brief time to apply to the Court of Appeals to maintain the injunction in effect?

THE COURT: How long do you want?

MS. ABRAMS: 30 days.

THE COURT: Any objection to that?

* * *

(p. 35) SUPERIOR COURT OF THE
STATE OF CALIFORNIA FOR
THE COUNTY OF LOS ANGELES

Department No. 59 Hon. Norman R. Dowds, Judge

PAUL DUFFY and EUNICE DUFFY,	)	
Plaintiffs,	)	No. C 528 746
vs.	)	REPORTER'S CERTIFICATE
CITY OF ARCADIA, et al.,	)	
Defendants.	)	

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

I, JEAN K. NISHIZU, do hereby certify:

That I am an official reporter of the Superior Court of the State of California, in and for the County of Los Angeles;

That I have transcribed the stenographic notes of YVONNE ENGHOLM, CSR No. 2160;

That the foregoing pages, 1 to 34, inclusive, comprise a full, true and correct transcript, to the best of my ability,

of said notes of the proceedings reported by said YVONNE ENGHILM, CSR No. 2160, in Department 59 on January 29, 1986 in the above-entitled action.

Dated this 12th day of August, 1986.

/s/ Jean K. Nishizu, CSR No. 1557
Offiical Reporter

MICHAEL H. MILLER
City Attorney
240 W. Huntington Drive
Arcadia, CA 91006
(818) 574-5407
Attorney for Defendants

SUPERIOR COURT OF THE
STATE OF CALIFORNIA FOR
THE COUNTY OF LOS ANGELES

PAUL DUFFY and EUNICE DUFFY,	Case No: C528746
Plaintiffs,	DECLARATION OF R. PIKE
v.	DATE: September 25, 1987
CITY OF ARCADIA, and DOES I through VII, inclusive,	TIME: 9:00 AM
Defendants.	DEPT: 82

I, REBECCA PIKE, declare as follows:

1. I am the Business License Officer for the City of Arcadia, Defendant in the above action. As one of my duties I am charged with the administration and enforcement of the City's Municipal Code Section pertaining to unattended newspaper racks on public property in the City of Arcadia as adopted by Ordinance No. 1615.

2. I have personal knowledge of the following facts and other matters of official record of the City of Arcadia. I am competent to testify as to the truth of these facts if called as a witness.

3. The document referred to by Plaintiff as administrative regulations, was written in 1977 and has not been applied by this office for several years. The City of Arcadia does not specify any particular type of newsracks, make or model, and is asserting only a dimensional requirement consistent with the Municipal Code.

4. Height is measured from the ground to the top of the back of the standing structure. Newsrack height includes the rack and mount as an integrated unit. It does not include the coin box at the top of the newsrack. The coin box has never been included in the calculation of newsrack height.

5. Recently, when the California Supreme Court refused to hear Plaintiffs appeal, in reliance on the Court of Appeal opinion in favor of the City whereby the height dimensions concerning newsracks was sustained, I served Plaintiffs with the required notice to remove their non-conforming (illegal) newsracks which measured 60 inches (5 feet) in height.

6. In response to the notice referred to in 5 above, Plaintiff removed their non-conforming newsracks throughout the City of Arcadia and replaced them with double-deck (lowboy style) newsracks that measure approximately 49½ - 50 inches and are therefore in substantial compliance with the provisions and purpose of the Arcadia Municipal Code.

7. In August and September, 1987 various photographs of the conforming newsracks were taken and are included herein.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed in Arcadia, California on September 10, 1987.

/s/ Rebecca Pike
Rebecca Pike
Business License Officer

DECLARATION OF ALBERT P. GIMENEZ

I, ALBERT P. GIMENEZ, declare:

1. I am the President of National Newsvend, manufacturers and installers of newspaper vending equipment and parts.

2. Our "Lowboy" (Model 78) newsrack was originally designed for Dow Jones Publications, to accommodate The Wall Street Journal and Barrons (their papers) in one newsrack. Attached to this declaration is a page from our current catalog describing the "Lowboy" Model 78 newsrack.

3. The "Lowboy" newsrack is especially useful for those who distribute low volume newspapers. It is designed to be compatible with our Model 10 in appearance and size and comes in the same woodgrain color. It takes up the same space as a conventional Model 10 for example, but instead of having the large deep box of that model (commonly required by high-volume big newspapers), it can be used to dispense 2 different issues from the same newsrack at the same time. The "Lowboy" is one newsrack: it is sold and spoken of in the newspaper industry as one newsrack.

4. The other advantage of the "Lowboy", for the smaller publications is price: this basic newsrack sells for $164.95, a difference of $64.05 compared to the $229.00 cost of two conventional Model 10's. Adding to this the 50% difference in installation costs results in a total cost difference for a distributor of $82.00 each.

5. The "Lowboy" newsrack itself is approximately 45″ high, 26″ wide and 20″ deep. It can be installed on

the same standard pedestals (16" or 8") as our other models, or we can customize pedestals to any height.

6. It is my professional opinion that the "Lowboy" model is the most appropriate newsrack for distributors of low-volume or small newspapers.

7. We do not manufacture a single pedestal mount for 3 machines, and to my knowledge no one does. That arrangement would be completely impractical and not strong enough. When 3 machines are placed on one mount, we use 2 pedestals because it is a stronger and much more stable arrangement. Similarly, it would be foolish to place two on one pedestal next to a single pedestal mount since a 3-Bay on two pedestals would be far stronger.

I declare under penalty of perjury that the foregoing is true and correct and was executed on July 7, 1981 at —, California.

/s/ Albert P. Gimenez
President

CITY OF ARCADIA

240 WEST HUNTINGTON DRIVE
ARCADIA, CALIFORNIA 91006
(818) 574-5407

(SEAL)
GEORGE J. WATTS
CITY MANAGER

Office of the
City Attorney
MICHAEL H. MILLER
City Attorney

August 5, 1987

Mr. Donald W. Cook
Attorney at Law
1416 Second Street
Santa Monica, CA 90401

Dear Mr. Cook:

I have been advised that your client, Mario Rosso, intends to install various newsracks in the City of Arcadia. One such newsrack has already been installed at 240 W. Huntington Drive. If the newsracks to be installed at various locations in the City as noted by Mr. Rosso are comparable to that which has been installed at 240 W. Huntington Drive, you are hereby advised that these newsracks are substantially consistent with the dimensional requirements of the Arcadia Municipal Code. As long as the coin boxes on top of the newsrack structure are of limited width dimensions, their height is not calculated with regard to newsrack height. This has been the consistent administrative practice of this office over the years in applying the dimensional requirements to newsracks.

Since you were the attorney of record in the case of Duffy vs. Arcadia and Rogers vs. Arcadia both of which sustained the City's dimensional requirements for newsracks, you are well aware of the City's requirements and how we interpret same. You have been advised numerous times

that as long as double-deck newsracks met the height requirements there is no prohibition on a double-deck type rack in the City of Arcadia. We have even suggested in our legal documents that such a rack is capable of design and would be deemed to be conforming. Apparently, your client Mr. Rosso is following our suggestion and has provided a newsrack which is both double-deck and consistent with the City's height requirements. The newsrack provided by Mr. Rosso at 240 W. Huntington Drive measured from the ground to the rear portion of the top of the rack which is our customary measuring practice is consistent with the Arcadia Municipal Code as opposed to the newsracks previously maintained by your client Duffy which measured 5 feet in height and were clearly in violation of the City's dimensional requirements.

If there are any questions regarding the above, please contact this office.

Sincerely,
/s/ Becky Pike
Becky Pike
Business License Officer

BP:lm

MICHAEL H. MILLER, CITY ATTORNEY
CITY OF ARCADIA: AND
BURKE, WILLIAMS & SORENSEN
PETER M. THORSON
VIRGINIA R. PESOLA
624 S. Grand Avenue
Suite 1100
Los Angeles, CA 90017
(213) 623-1900
Attorneys for Defendants

SUPERIOR COURT OF THE
STATE OF CALIFORNIA FOR
THE COUNTY OF LOS ANGELES

PAUL DUFFY and EUNICE DUFFY, Plaintiffs, v. CITY OF ARCADIA, et al., Defendants.	Case No: C528746 DECLARATION OF MICHAEL H. MILLER *Hearing* DATE: November 20, 1987 TIME: 9:00 A.M. DEPT. 82

I, MICHAEL H. MILLER, declare as follows:

1. I am the full time City Attorney for the City of Arcadia. I have served in that capacity since January of 1983.

2. Consistent with my duties in the above position, after Plaintiff's removed their conforming newsracks and replaced them with nonconforming racks, and subsequent to attempts by City staff to seek the cooperation of Mr. Duffy, I advised him in writing as to the legal requirement

that he remove his newsracks for violating the City's height requirements.

3. In response to the letter notice to Plaintiff Duffy, I received a telephone call from Attorney Linda Abrams who represented herself as Plaintiff's legal Counsel. Attorney Abrams and I conducted various telephonic conversations regarding this matter prior to her filing subject action for a temporary restraining order and preliminary injunction. In those conversations I advised Ms. Abrams on numerous occasions that the only thing the City required was a rack that met the City's height requirement, that her client could use the same style as long as height conformed to City requirements. At no time were we concerned over the double-deck nature of the newsrack.

4. As a result of prevailing in this lawsuit Plaintiff has provided newsracks (albeit double-deck low-boy style newsracks) that meet the City's height requirement and therefore satisfy our concerns for uniformity, aesthetics and safety.

5. Throughout the litigation of this case and concomitant with Mr. Cook's entry into this case on appeal, he was also advised as to what was necessary to comply i.e. a newsrack that meets the City's height requirements.

6. Throughout the evolution of this case from its inception to now, the City has never questioned the propriety of the low-boy style newsrack. Plaintiff's failure to comply early on with the newsrack that he has now installed was done at his discretion, and does not formulate the basis for any fictional victory that would justify the funding of his legal fees either partially or in total by the taxpayers' of Arcadia.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed in Arcadia, California on November 13, 1987.

/s/ Michael H. Miller
City Attorney